Supreme Court, U.S.
FILED

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No. ____

# In The
# Supreme Court of the United States

MILLIE MAX,

*Petitioner*,

v.

REPUBLICAN COMMITTEE OF LANCASTER COUNTY, DAVID M. DUMEYER, In his Official Capacity as Chairman of the Republican Committee of Lancaster County, ANDREW HEATH, LANCASTER COUNTY REPUBLICAN HEADQUARTERS, a nonprofit corporation,

*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

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March 16, 2010

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## QUESTIONS PRESENTED

1. Whether political parties are state actors during primary elections where the State has granted the party a role in the election process by giving the party the right to have their candidates appear with party endorsement on the general election ballot.

2. Whether the state action doctrine applies with equal force to political parties exercising delegated state power during primary elections in violation of the First Amendment as it does when parties exercise that power in derogation of the Fifteenth Amendment.

## RULE 14.1(b) STATEMENT: PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

*Plaintiff-Appellant and Petitioner*: Millie Max

*Defendants-Appellees and Respondents*: Republican Committee of Lancaster County, Lancaster County Republican Headquarters, Andrew Heath, and David M. Dumeyer.

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## PETITION FOR A WRIT OF CERTIORARI

Millie Max respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit, dated November 13, 2009, is officially reported at 587 F.3d 198 (3rd Cir. 2009) and is reproduced at App. 1a – 13a.

The order of the Third Circuit denying reconsideration and rehearing *en banc*, dated December 16, 2009, is unreported, and is reprinted at App. 30a – 31a.

The Memorandum Opinion and Order of the U.S. District Court for the Eastern District of Pennsylvania, dated October 7, 2008, is unreported and is reproduced at App. 14a – 29a.

## JURISDICTION

The final judgment of the U.S. Court of Appeals for the Third Circuit sought to be reviewed was entered on December 16, 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days after the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Amendment I to the Constitution of the United States*

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

*Amendment XIV to the Constitution of the United States*

§ 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Pennsylvania Election Law*

25 P.S. § 2862: All candidates of political parties, as defined in section 801 of this act,[1] for the offices of United States Senator, Representative in Congress and for all other elective public offices within this State, except that of presidential electors, shall be nominated, and party delegates and alternate

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[1] 25 P.S. § 2831

delegates, committeemen and officers who, under the provisions of Article VIII of this act[2] or under the party rules, are required to be elected by the party electors, shall be elected at primaries held in accordance with the provisions of this act, except as otherwise provided in this act. In the years when candidates for the office of President of the United States are to be nominated, every registered and enrolled member of a political party shall have the opportunity at the Spring primary in such years to vote his preference for one person to be the candidate of his political party for President.

25 P.S. § 2882: Candidates of the various political parties for nomination, except for the office of President of the United States, who receive a plurality of votes of their party electors in the State, or in the political district, as the case may be, at the primary election, together with the candidates for the office of presidential elector nominated as herein provided, shall be candidates of their respective parties, and it shall be the duty of the proper county boards to print their names upon the official ballot and ballot labels at the succeeding election....

25 P.S. § 2963: (a) The official ballots for general, municipal and special elections shall be in substantially the following form: .... (b): ...Opposite or under the name of each candidate shall be printed the name or appellation of the political party or political body nominating him, and at the right of such name or appellation there shall be a square of sufficient size for the convenient insertion of a cross (x) or check (√) mark....

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[2] 25 P.S. §§ 2831 *et seq.*

## STATEMENT OF THE CASE

At all relevant times, Respondent Republican Committee of Lancaster County was qualified as a political party required to select state and local party candidates for the general election in a state-paid public primary election.[3] As a result, Respondent Republican Committee of Lancaster County, by operation of state law, is entitled to have its nominees, selected by the entire party electorate at the primary election, placed by public officials directly onto the Commonwealth's general election ballot with party endorsement. 25 P.S. § 2963(b).

Prior to the 2007 primary election, the leadership of Respondent Republican Committee of Lancaster County endorsed a slate of preferred candidates. App. 15a-16a. The endorsement was secured by a vote of all elected committeemen and committeewoman present at the county endorsement meeting.[4] The endorsement allowed the central party apparatus to expend funds in support of the slate of endorsed candidates. However, no internal party rule requires party members to support the endorsed candidates,

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[3] The Pennsylvania Election Code, 25 P.S. § 2831, defines a "political party" as any political body which had any affiliated candidate poll a certain threshold percentage of the vote at the previous general election. Respondent Republican Committee of Lancaster County has never failed to secure "political party" status under the Pennsylvania Election Code.

[4] In Pennsylvania, the registered party members in each election district may elect one Republican committeeman and one Republican committeewoman to represent them on the party's county committee.

nor prohibits them from openly opposing endorsed candidates in favor of other party candidates running without the public endorsement of the party leadership.

Petitioner Millie Max, an elected committeewoman of Respondent Republican Committee of Lancaster County openly opposed two of the party's endorsed candidates during the 2007 primary election, supporting other party members running without leadership endorsement. App. 15a-16a. As part of her campaign of opposition, Petitioner communicated truthful information about the two disfavored candidates directly to registered party voters during the election campaign. App. 16a. Respondent, by and through its employee Andrew Heath, in an effort to actively suppress dissemination of negative information to party voters which might damage the electoral prospect for their endorsed candidates, directly threatened Petitioner the evening before the primary election that her active opposition had caused Respondents to trigger a police investigation against Petitioner. App. 16a. On the day of the 2007 primary election, Respondents also sent party workers, armed with state poll-watching certificates, to intimidate Petitioner from further speech against the endorsed candidates and to monitor Petitioner's speech to voters at the polls with instructions to report back to Respondent Heath and/or Dumeyer on Petitioner's conduct for possible further party retaliation against Petitioner. App. 16a-17a. The aggregate effect of Respondents' threats and intimidation was that Petitioner did, in fact, constrain her speech to voters during the 2007 primary election. App. 17a.

After the primary election, Respondent Dumeyer sent a letter to Petitioner under official party letterhead, seeking to impose rules on Petitioner during all future primary elections by instructing her that she should not openly oppose endorsed candidates (especially to voters outside of her election district) in order to maintain her future status as a committeewoman in good standing. App. 17a-19a. The substantive provisions of Respondent Dumeyer's letter to Petitioner are not supported by any party rule.

On October 25, 2007, Petitioner filed the instant litigation under 42 U.S.C. § 1983 against Respondents for violating rights secured to her under the First Amendment to the United States Constitution. App. 20a. The sole issue throughout this litigation is whether or not political parties are state actors during primary elections where the state has granted them a role in the election process through the automatic right to have their primary election victors placed – by state employees – on the Commonwealth's general election ballot with party endorsement. Petitioner has argued the "state actor" status of political parties during primary elections is a clearly defined exception to the general rule that political parties are private entities not subject to constitutional constraint. If political parties are not "state actors" in modern primary elections, then there is no constitutional basis to prevent political parties from excluding African-Americans (or any other disfavored group) from participation in party primaries in violation of the Fifteenth Amendment as this Court has, in fact, ruled they are in *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953). Most importantly, the state action doctrine has never been

constrained to apply to only some constitutional provisions applicable to the States and not to others. It is a doctrine of broad application. As this Court is fully aware, the First Amendment has been applied to the States through the Fourteenth Amendment.

Consistent with *Smith* and *Terry*, just two terms ago, this Court expressed the view that the First Amendment rights of political parties "are circumscribed, however, when the State gives the party a role in the election process – as New York has done here by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot." *New York State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 203 (2008). Pennsylvania has given Respondents the same electoral role by giving them the right to have their candidates appear with party endorsement on the Commonwealth's general election ballot.

The district court ruled political parties are not state actors during primary elections by flatly evading any attempt to intellectually distinguish *Smith*, *Terry*, or *New York State Bd. of Elections* issuing a bare opinion, void of virtually any persuasive legal analysis. App. 23a-28a. The Third Circuit chose to ignore this Court's relevant direction in *New York State Bd. of Elections* (by focusing on the wrong text (App. at 8a)) and relegated *Smith* and *Terry* to a virtual nullity in modern primary elections where political parties no longer control the individual components of the election machinery, ignoring the fact that political parties are nevertheless engaged in the (more important) macro electoral function of selecting the names which shall appear on the state's general-election ballot – a sovereign prerogative of the State

delegated to Respondents. App. 6a-11a. The Third Circuit then further confused the issue by reciting some of the many situations in which pure internal party conduct was not state action (none of which implicate public primary elections which are certainly not internal party affairs). App. 8a-9a.

## REASONS FOR GRANTING THE PETITION

### I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULINGS IN *SMITH V. ALLWRIGHT*, AND *TERRY V. ADAMS*, WHICH ESTABLISH THAT POLITICAL PARTIES ARE STATE ACTORS DURING PRIMARY ELECTIONS AND THEIR CONDUCT IMPACTING THE GENERAL ELECTION BALLOT CONSTRAINED BY THE FEDERAL CONSTITUTION

This Court should grant *certiorari* to resolve the clash between the Third Circuit's decision, which holds a political party is not a state actor by virtue of the role given to the party by the Commonwealth of Pennsylvania in the election process and the Court's decisions in *Smith v. Allwright* and *Terry v. Adams* which held political parties are state actors during the primary election by virtue of the authority given to political parties in selecting candidates for the general election ballot in a primary election.

In *Smith v. Allwright* this Court held the First Amendment right of association of a political party to determine its membership was subject to state action constraint where membership criteria acted to exclude African-Americans from voting in a primary to select nominees for a general election. *Id.* at 665. The Third

Circuit opinion ignores the fact that First Amendment speech is as integral a component to the primary election process of selecting candidates for the state's general election ballot as is the determination of who may cast votes in a primary election. This Court has recognized that "an election campaign is an effective platform for the expression of views on the issues of the day," and that a "candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). More recently this Court articulated the unsurprising proposition that "debate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989). Simply stated, if a political party is a state actor during primary elections when they exclude African-Americans from participating in selecting general election candidates, then the conduct of a political party to exclude and discriminate against dissenting political speech from a primary election must also be considered state action under the rational of *Smith v. Allwright* and its progeny.

More recently, this Court reaffirmed that "when a State prescribes an election process that gives a special role to political parties...the parties' discriminatory action becomes state action...." *California Democratic Party v. Jones*, 530 U.S. 567, 573 (2000). And again, perhaps speaking more directly to the modern primary election where political parties do not have as much physical control of the election machinery as they did during the 1940's, this Court clearly stated that "when the State gives the party a role in the election process...by giving certain parties the right to have their candidates appear with party

endorsement on the general-election ballot...the party's discriminatory action may become state action...." *New York State Bd. of Elections*, 552 U.S. at 203.

This Court went even further in *Terry v. Adams* where it held the conduct of the mere alter ego of a political party – the unregulated all-white county Jaybird Associations – engaged in state action subject to constitutional constraint where its purpose was to exclude African-Americans from meaningful participation in selecting candidates for the general election ballot. *Terry*, 345 U.S. at 468-70. In the instant case, Respondents' role in selecting general election candidates is not as attenuated as the Jaybird Associations in *Terry*. Respondents are, in fact, the very legal entity to whom the Commonwealth delegated its sovereign power to determine who shall appear on its general election ballot.

And it is on this point that, perhaps, sends the Third Circuit's opinion veering off track. The Third Circuit correctly notes that the State has vested the right to pick Respondents' general election candidates to the entire party electorate – not just to Respondents. App. 6a. The Third Circuit suggests this fact removes Respondents from any possible state action. The Third Circuit ignores, however, that the party apparatus – is the legal entity to whom State power is delegated, and that Respondents, individually in their official capacity, represent the entire party (and with respect to the Respondent Republican Committee of Lancaster County, it is the party). Respondents are not merely stray party members.

Respondents speak and act for the entire party.[5] Their action is the action of the party. The fact that the State chose not to vest candidate selection solely with the party leadership, does not diminish Respondents' role as the legal representative of the entire party to whom the State has delegated its authority.

## II. THE COURT SHOULD GRANT THE PETITION TO SETTLE THE CONSTITUTIONAL STATUS OF POLITICAL PARTIES IN THE CONTEXT OF THE MODERN PRIMARY ELECTION

This case raises a fundamental constitutional issue of national importance: the constitutional status of political parties during the modern primary election, and whether political parties, exercising delegated state power to place candidates directly upon the state's general election ballot, may suppress information during a primary election and adulterate

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[5] 25 P.S. §2837 provides: "There may be in each county a county committee for each political party within such county, the members of which shall be elected at the spring primary, or appointed, as the rules of the respective parties within the county may provide. The county committee of each party may make such rules for the government of the party in the county, not inconsistent with law or with the State rules of the party...."

"Article II, § 5(A) of the 'Rules of the Republican Committee of Lancaster County' (hereinafter the "Rules") vests sole authority in Defendant Dave M. Dumeyer to be the chief executive officer of the Republican Party of Lancaster County and its designated spokesman at all levels of Party affairs. Article I, § 2 of the Rules provides that Defendant Republican Committee of Lancaster County is to have '*full control* of the Republican Party of and in the County of Lancaster and its various election districts'" (emphasis added). Petitioner's Amended Complaint ¶¶ 37-38.

the election process to favor one slate of candidates over another.

States have wide discretion in determining the structure of party nomination processes, *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992), and have the authority to require that political parties select their candidates through primary election. *See American Party of Tex. v. White*, 415 U.S. 767, 781 (1974). Pennsylvania has chosen to require political parties within the State to select their general election candidates by a vote of the entire party electorate. 25 P.S. §2862. Experience informs that the vast majority of national, state and local candidates are placed on state general election ballots with party endorsement by virtue of the requirement that political parties select their general election candidates in state mandated and funded primary elections open to all registered party members.

Implicit in any state mandated election is that the First Amendment protects the right of the electorate access to any information communicated by willing speakers free from state interference. "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process...the First Amendment rights that attach to their roles." *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marchall, J., dissenting)). A State cannot, itself, establish an election free from First Amendment constraint. "It is simply not the function of government to select which

issues are worth discussing or debating in the course of a political campaign." *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

The issue in the instant petition is whether political parties, in exercise of delegated state power to determine who shall appear on a State's general election ballot, are similarly constrained by the First Amendment from suppressing political speech during a primary election. At stake is whether or not political parties (and their leadership) are permitted to exclude unwanted political speech, through threats, intimidation or other conduct against less powerful and vulnerable party members in order to gain a political advantage for their preferred slate of candidates. Unless this Court clearly articulates that political parties, acting through their designated leaders, are state actors during primary elections in situations where they are given a role in the electoral process, the ability of voters to make a fully informed choice will be impaired. General election ballots will represent the impaired will of a less informed electorate, manipulated by a virtually unconstrained cadre of party bosses.

The Third Circuit's opinion guarantees "the electorate [will be] deprived of information, knowledge and opinion vital to its function." *United States v. Congress of Indus. Org.*, 335 U.S. 106, 144 (1948). The integrity of the general election ballot as reflecting the will of an informed electorate is an issue of sufficient national importance to warrant the grant by this Court of the requested Writ.

## ARGUMENT

### A. THE THIRD CIRCUIT'S OPINION IS AMENABLE TO SUMMARY ACTION AS IT CLEARLY CONFLICTS WITH PRECEDENT OF THIS COURT

The Third Circuit's opinion in this case is amenable to summary reversal. This Court clearly articulated, consistent with the rational announced in *Smith* and *Terry* that the constitutional rights of political parties are circumscribed "when the State gives the party a role in the election process...by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot." *New York State Bd. of Elections*, 552 U.S. at 203 (2008). In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court explained "when a State prescribes an election process that gives a special role to political parties it 'endorses, adopts and enforces the discrimination' that the parties...bring into the process...so that the parties' discriminatory action...becomes state action." *Id.* at 573 (quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944)).

There is no factual dispute or unresolved legal issue that the Commonwealth of Pennsylvania has given Respondents a role in the election process by giving Respondent Republican Committee of Lancaster County the right to have its candidates appear with party endorsement on the general election ballot. *See* 25 P.S. §§ 2862, 2882, 2963(a)(b).

It is certainly true that political parties no longer control the physical election apparatus as they did when this Court decided *Smith* and *Terry*. But the

true essence of state action during an election campaign, as explained in *New York State Bd. of Elections*, is not merely the control of election rolls and machines but rather the exercise of state delegated power by political parties to determine who shall appear on the State's general election ballot – a plenary power of the State subject only to federal constitutional constraint. The Third Circuit's opinion, if left undisturbed, will cement the odd doctrine that political parties, through their designated leaders, may exercise sovereign State power in a manner that the State, had it retained its power, could not have exercised as a result of federal constitutional constraint on State authority. "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." *Brown*, 456 U.S. at 60 (1982).

This Court's most recent articulation of political party state action in *New York State Bd. of Elections* recognizes that state action is triggered as a result of the role the State has given a political party in the State's election process – the right to have their candidates placed directly on the general election ballot with party endorsement. Where political parties are given such a role in the election process, they are state actors whether or not they engage is bad conduct. The state action analysis at issue in this petition is just the first prong of a broader analysis to determine §1983 liability. The first prong, at issue in this petition, determines whether or not the party is a state actor by virtue of the role the state has given to the party in the electoral process. Only after state actor status is first determined, will the second prong of §1983 liability analysis determine whether the party engaged in conduct which impaired constitutional

rights and whether it is tied to the role the party was given by the State in the electoral process.

An otherwise private entity becomes a state actor only because the state has taken some step to elevate the entity to state actor status (either, as here, by express delegation of state power or by some other relationship entered into between the entity and the state). A private individual or entity cannot do anything, on its own, to elevate itself to state actor status. Only after an otherwise private entity is deemed to be a state actor does the conduct of that entity determine liability under §1983.

Only the first prong of this analysis is at issue in this petition – a determination that political parties are state actors in a primary election because the Commonwealth has delegated to the party the right to place the name of its candidates directly upon the general election ballot with party endorsement. The second prong to determine §1983 liability is for a jury to determine.

A fair reading of the Third Circuit's opinion is that it failed to apply the straight-forward state action analysis for political parties explained in *New York State Bd. of Elections* and conflated the two prongs of §1983 analysis looking for some evidence that the state somehow directed Respondent's conduct. App 6a – 11a.

There is no dispute that the Pennsylvania Election Code gives Respondent Republican Committee of Lancaster County the right to place its primary election victors directly onto the Commonwealth's general election ballot with party endorsement. If

what this Court explained in *New York State Bd. of Elections* is true, then Respondents are state actors during primary elections and the Third Circuit's opinion should be summarily reversed so that a jury can determine whether or not Respondents' conduct impaired rights secured to Petitioner under the First Amendment.

## B. THE STATE ACTION FORMULA FOR POLITICAL PARTIES EXPLAINED IN *NEW YORK STATE BD. OF ELECTIONS* IS CONSISTENT WITH THIS COURT'S TRADITIONAL §1983 STATE ACTION JURISPRUDENCE

When a State delegates to a political party the right to determine who shall appear on its general election ballot with party endorsement, two of the three traditional tests for §1983 state action are satisfied.

### 1. Exclusive Public Function Test Satisfied

Respondents' power, delegated to it by the Commonwealth of Pennsylvania, to command state officials to place the name of its primary election victors on the general election ballot with party endorsement, is an exercise of an exclusive public function and elevates Respondents from private to state actors during a primary election. This Court explained in *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978), that the public function doctrine, while narrowly defined, encompasses state-regulated elections. *Id.* at 158. Since state action analysis is employed to determine if an otherwise private entity is subject to §1983 liability as a state actor, this Court's discussion of political party state action in *New*

*York State Bd. of Elections* is consistent with the Court's exclusive public function test for state action.

**2. Joint Action Test Satisfied**

The joint action test explains that an otherwise private entity becomes a state actor, subject to §1983 liability, when its conduct becomes an "indispensable part of the State's plan" of action. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-24 (1961). There can be no clearer example of a symbolic relationship or joint action between an otherwise private entity and the State than where the State has delegated power to determine who shall appear on its general election ballot to a political party.

In *Burton*, a restaurant was considered a state actor, subject to §1983 liability for its discriminatory conduct, where the restaurant's rental payments were considered indispensable to the parking authority's financing of the parking garage in which the restaurant was located. As applied to the instant case, the Commonwealth of Pennsylvania cannot hold a general election without the names of candidates to place on its general election ballot. Under the Commonwealth's electoral scheme, Respondent Republican Committee of Lancaster County is required to provide the Commonwealth the indispensable component of a general election – candidates.

It is clear, therefore, that this Court's explanation in *New York State Bd. of Elections* that the electoral role necessary to elevate a political party to a state actor in a primary election is the right to have its candidates appear on the general election ballot with party endorsement -- an analysis consistent with, and

required by, the traditional joint action test for §1983 state action liability.

### C. THE INTEGRITY OF GENERAL ELECTION BALLOTS REQUIRE THAT POLITICAL PARTIES WHO EXERCISE DELEGATED STATE POWER TO DETERMINE WHO SHALL APPEAR ON A STATE'S GENERAL ELECTION BALLOT BE CONSIDERED STATE ACTORS DURING THE PRIMARY ELECTION PROCESS

The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)) *see also Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution"). The decisions of this Court make it clear that the suppression of speech concerning the qualification of candidates during an election strikes at the very heart of the entire purpose of an election: the selection of public officials by an informed electorate. The First Amendment is not a mere periphery to an election campaign. An election campaign is free speech.

Suppression of unwanted political speech during a primary election negates the very purpose of the election and impairs the party electorate's ability to make an informed choice about candidates and the direction in which those seeking to by the party's standard-bearer will take the party. In fact, this

Court's jurisprudence defining the relationship between the rights of political parties and the State manifest a concern not merely about the rights of party bosses but the integrity and rights of the entire party electorate to make a decision about the direction of the party free from improper influence. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-17 (1986). Political parties, their bosses and the various factions within all retain their own First Amendment right to compete in the market-place of ideas. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (state "must accord the participants in that process...the First Amendment rights that attach to their roles"). The right to compete, free from state interference, is all the First Amendment guarantees. The right to compete, however, does not encompass the right to suppress dissenting points-of-view or information damaging to the agenda of one party faction where state action is implicated, as it is during the conduct of primary elections.

If a political party, acting through its leadership, is considered a state actor during a primary election when it seeks to exclude African-Americans from voting in violation of the Fifteenth Amendment, then it must also be considered a state actor during a primary election when it seeks to exclude unwanted political speech from a primary election. No decision of this Court has ever confined the state action doctrine to just certain provisions of the Constitution. History mandated that this Court apply the state action doctrine to political parties first to address racial discrimination in violation of the Fifteenth Amendment. This Court must now apply the state

action doctrine to address the suppression of First Amendment speech by political parties and their leaders during primary elections.

The exclusion of certain voters and unwanted speech from the electoral process both equally threaten to bastardize the results of primary elections and the resulting general election ballots. Unless political parties are constrained during primary elections under the state action doctrine from active suppression of dissenting political speech, the integrity of the resulting general election ballots remain at risk.

## CONCLUSION

For the foregoing reasons, this Court should either summarily reverse the decision of the United States Court of Appeals for the Third Circuit or, in the alternative, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX

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## APPENDIX A

PRECEDENTIAL

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No. 08-4158**

**[Filed November 13, 2009]**

MILLIE MAX,
Appellant

v.

REPUBLICAN COMMITTEE OF LANCASTER COUNTY; DAVID M. DUMEYER, In his Official Capacity as Chairman of the Republican Committee of Lancaster County; ANDREW HEATH; LANCASTER COUNTY REPUBLICAN HEADQUARTERS, a nonprofit corporation

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-07-cv-04488)
District Judge: Honorable James T. Giles

Argued October 28, 2009

Before: SLOVITER, FUENTES, and HARDIMAN,
Circuit Judges

(Filed: November 13, 2009)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Appellant Millie Max appeals the District Court's order granting the motion to dismiss filed by defendants, the Republican Committee of Lancaster County ("RCLC"), the Lancaster County Republican Headquarters ("LCRH") (a nonprofit corporation controlled by the RCLC), David M. Dumeyer (the chairman of the RCLC), and Andrew Heath (an employee and executive director of the RCLC) (collectively, "defendants"). Max alleges that defendants infringed upon her First Amendment

rights of free speech and expression during a primary election campaign for judgeships on the Lancaster County Court of Common Pleas. She filed this action under 42 U.S.C. § 1983.[1]

I.

Max was an elected committeewoman for the RCLC. The RCLC is a political committee organized under the laws of the Commonwealth of Pennsylvania. As such, the RCLC is entitled to nominate candidates at primaries for inclusion on the general election ballot, which it does by a vote of the party electors. *See* 25 P.S. § 2862. The registered Republican voters of Lancaster County comprise the electors in the primary for Common Pleas judgeships. *Id.* § 2832.

II.

Max's amended complaint contains five counts, all of which allege that defendants retaliated against Max in violation of the First Amendment because she criticized two of the party's endorsed candidates and instead supported an unendorsed candidate. It appears that the RCLC regarded Max as a wayward Republican committeewoman because she was unwilling to support the endorsed candidates and openly lobbied against them.

Max alleges that in or about May 2007, Heath heard that someone was campaigning door-to-door against endorsed candidates. Heath asked Max if she

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[1] The District Court had jurisdiction under 28 U.S.C §§ 1331 and 1343(a)(3), and this court has jurisdiction under 28 U.S.C. § 1291.

knew who it was and said that he was tracing the suspect's license plate number. When Max admitted that she was the individual he sought, Heath threatened to "convene a meeting after the election" at which Max "understood that she would likely be asked to resign her elected position." App. at 107. Defendants then "instructed certain poll workers to observe and report back to Defendants on [Max's] . . . political speech and campaign efforts." App. at 99. After the primary election, Dumeyer wrote a letter to Max in which he warned that campaigning against endorsed candidates was inappropriate for someone in her position, and that she should either refrain from further doing so or should resign.[2] Max's counsel conceded at oral argument that, under the applicable bylaws, defendants could not have removed Max from her committeewoman position because of her conduct.

Defendants filed a motion under Fed. R. Civ. P. 12(b)(6) to dismiss the amended complaint, which the District Court granted. Max's appeal of that order is before us.

We review de novo a district court's dismissal of an action pursuant to Rule 12(b)(6). *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 302 (3d Cir. 2008). In deciding a motion to dismiss, courts generally must "accept all factual allegations as true, construe the complaint in the light most favorable to the

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[2] She alleges that as a result of defendants' actions she suffered a stigma and censored her own speech. She states that as a result of defendants' letter, she "must weigh and nicely balance every word," and "has a legitimate fear that such information may be used to defeat her in a future primary election campaign for her committee position." Appellant's Br. at 28.

plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)). To withstand a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

## III.

It is axiomatic that the First Amendment governs only state action, not the actions of private entities. As a threshold matter, therefore, we must determine whether defendants are state actors.[3] This determination requires a fact-based analysis of the particulars of each case. *See Benn*, 371 F.3d at 171 (observing that the Supreme Court has noted that the criteria for determining whether state action is present "lack rigid simplicity").

The thrust of Max's argument is that defendants are state actors under § 1983 because the Commonwealth of Pennsylvania has delegated to the Republican party the authority to decide "who will appear on the Commonwealth's general election ballot." Appellant's Br. at 9, 16. She contends that this

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[3] We note that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *Benn v. Universal Health Sys., Inc.*, 371 F.3d 165, 170 n.1 (3d Cir. 2004) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)).

power is traditionally exclusive to state actors. Max is correct that state action may be imputed to private groups who carry out functions that are "governmental in nature." *Evans v. Newton*, 382 U.S. 296, 299 (1966) (establishing the "public function" test for state action). However, her contention is unavailing.

As defendants note, Max conflates the role of the RCLC with that of the electorate. That is, she argues that the RCLC, a designated political committee, performs the traditionally public function of choosing candidates for the general election but in fact Pennsylvania delegates such authority to the *registered voters* of the Republican Party. Max's premise fails to distinguish between the RCLC, which endorses candidates in the primary, and the corpus of registered Republican voters who, by voting in the primary election, actually select the nominees for the general election. *See* 25 P.S. §§ 2831, 2812.

An RCLC endorsement does not necessarily guarantee a place on the general election ballot. If it did, Max would have no reason to campaign for her unendorsed candidate and criticize the two endorsed candidates. Rather, an RCLC endorsement is no more than an advantage, albeit often a substantial one, to those seeking to compete in a general election. Thus, it is the registered Republican voters of Lancaster County, not defendants, to whom Pennsylvania has delegated authority to perform the public function of selecting the Republican candidates to be placed on the ballot for the general election.

Moreover, the principal cases upon which Max relies are distinguishable from the one at hand. For instance, Max's blanket assertion – that political

parties are state actors during primary elections – derives from two Supreme Court cases from the Jim Crow era. These cases, *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), involved two attempts by the Democratic Party of Texas to bar African-Americans from participating in primary elections. In both instances, the Supreme Court sustained the claims under § 1983 because Texas left it up to private groups, i.e. political parties, to decide who could vote so as to intentionally circumvent the Fifteenth Amendment. *See Terry*, 345 U.S. at 466 ("the . . . right to be free from racial discrimination in voting 'is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination . . . .'" (quoting *Smith*, 321 U.S. at 664)).

There are at least two reasons why those decisions are inapposite. First, whereas Texas and the Democratic Party were working in concert to deny African-American participation in primaries, nothing in the record here suggests that Pennsylvania delegated authority to defendants with the intention of violating the constitutional rights of Max or anyone else. Max cannot plausibly assert that "the fingerprints of the state" are on the alleged infringement of her rights. *Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005).

Second, *Smith* and *Terry* involved attempts by a political party to violate the rights of persons who were not associated with the party. The instant case involves an alleged attempt by a political party to violate the rights of a party member. This distinction is key. In several decisions, the courts have expressly declined to interfere in the internal affairs of political

parties. Indeed, in some cases the First Amendment has been cited as the basis for prohibiting such judicial meddling. For example, in *New York State Board of Elections v. Lopez Torres*, 128 S. Ct. 791, 797 (2008), the Supreme Court stated that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."

Max relies on *Lynch v. Torquato*, 343 F.2d 370 (3d Cir. 1965), to buttress her contentions, but that decision is inapt. In *Lynch*, although we noted that political parties could be state actors during primaries, we did not reach that question because we held that there had been no violation of the plaintiff's constitutional rights. *See id.* at 373 ("this lawsuit appears to be an effort . . . to wrest control of ordinary party affairs from present leadership rather than an attempt to vindicate the plaintiffs' [constitutional] right[s] . . . .").

Max cites the language in *Valenti v. Pennsylvania Democratic State Committee*, 844 F. Supp. 1015, 1019 (M.D. Pa. 1994), where the court commented that in *Smith* the Supreme Court reasoned that by limiting general election choices to those candidates who prevail in the primary, the state "endors[es] whatever unconstitutional conduct might have limited the party's field of candidates in the primary." However, in *Valenti* the court held that political parties may suppress political speech from party members during their internal endorsement process. *Id.* at 1017-19.

Other decisions have also declined to elevate internal party issues to a constitutional level. In *Blank*

*v. Heineman*, 771 F. Supp. 1013, 1014-15 (D. Neb. 1991), the court rejected the claims of plaintiffs who sued the Executive Committee of the Republican Party under § 1983 alleging they were removed from their elected positions within the party because they were evangelical Christians. The plaintiffs asserted that their removal was state action because "ultimately primary and general elections [would] be affected." *Id.* at 1018. The court characterized the plaintiffs' theory as an "attempt[] to 'bootstrap' and transform actions relating solely to the internal activity of a political party into activity which constitutes state action. . . ." *Id.* The court dismissed the case, stating that "the plaintiffs' argument, carried to its logical extension, would transform *any* action of a political party involving internal affairs into state action." *Id.*

Such reasoning is persuasive here. Max asserts that defendants "engaged in state action when they sought to exclude and limit [Max's] unwanted political speech during the 2007 primary election in order to manipulate and influence who was placed on the Commonwealth's 2007 general election ballot. . . ." Appellant's Br. at 21. The District Court rejected this argument, stating that:

> Defendants [sic] actions toward Plaintiff were not state actions that would subject Defendants to Section 1983 claims. Defendants' actions were internal to the party and are permissible by statute of the Commonwealth of Pennsylvania, 25 P.S. § 2837, and by the First and Fourteenth Amendments of the United States Constitution. Plaintiff is correct that the RCLC has a role as a state actor in primary elections, . . . but that does not make all of

> RCLC's actions state actions, as Plaintiff contends.

App. at 14. We agree.

Max next argues that Heath's threat to trace a license plate constituted state action because the power to trace a license plate is exclusive to the state. Even accepting that assertion, there is no allegation that Heath or any other defendant actually employed the machinery of the state to trace Max's license plate number. As Max concedes, Heath's threat was a bluff meant to induce her into admitting that she had campaigned against the RCLC's endorsed candidates. Tracing a license plate number may be state action as a "public function," but bluster about doing so is not.

Finally, Max claims that encouraging poll-workers to observe and report on her behavior on the day of the primary election constituted state action under *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979). There, the court stated that if the unconstitutional conduct of an officially certified pollwatcher was "made possible by state election law, and if one sequela of their conduct is to further the purity of an exclusive state concern, i.e. elections, then their actions are for § 1983 purposes properly attributable to the state." *Id.*

Even if we accept the premise that poll-workers are state actors while guarding the integrity of an election, the defendants here, unlike those in *Tiryak*, are not the poll-watchers. Defendants here are private parties. Although a private party can be liable under § 1983 if he or she willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right, *see Abbott v. Latshaw*, 164 F.3d

141, 147-48 (3d Cir. 1998), this is not such a case. Max alleges that defendants "instructed certain poll workers to observe and report back to Defendants on Plaintiff's 2007 primary election day political speech and campaign efforts" and "certain poll workers did, in fact, observe and report back to Defendants . . . ." App. at 99. At most, defendants used the poll-workers to obtain information. This is not the same as conspiring to violate Max's First Amendment rights.

## IV.

Although there may well be situations where the actions of a political party in a primary election are deemed to be state action, defendants' alleged actions do not present such a situation. For the reasons set forth, we will affirm the District Court's order dismissing Max's First Amendment claim.

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No. 08-4158**

**[Filed November 13, 2009]**

| | |
|---|---|
| MILLIE MAX, | ) |
| Appellant | ) |
| | ) |
| v. | ) |
| | ) |
| REPUBLICAN COMMITTEE OF LANCASTER COUNTY; DAVID M. DUMEYER, In his Official Capacity as Chairman of the Republican Committee of Lancaster County; ANDREW HEATH; LANCASTER COUNTY REPUBLICAN HEADQUARTERS, a nonprofit corporation | ) |

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-07-cv-04488)
District Judge: Honorable James T. Giles

Before: SLOVITER, FUENTES, and HARDIMAN,
Circuit Judges.

**JUDGMENT**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on October 28, 2009.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered October 7, 2008, be and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: November 13, 2009

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION
**No. 07-4488**

**[Filed October 7, 2008]**

| | |
|---|---|
| MILLIE MAX, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| REPUBLICAN COMMITTEE OF LANCASTER COUNTY, et al., | ) |
| | ) |
| Defendants. | ) |
| | ) |

**MEMORANDUM**

Giles, J. October 3, 2008

Before the court is Defendants Republican Committee of Lancaster County ("RCLC"), Andrew Heath, David M. Dumeyer, and Lancaster County Republican Headquarters' ("LCRH") Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. No. 15), Plaintiff Millie Max's

Response in Opposition thereto (Doc. No. 17), and Defendants' Reply (Doc. No. 24). The court held oral arguments on this matter on January 25, 2008. For the reasons that follow, Defendants' Motion to Dismiss is granted.

## Facts and Procedural History

The court recites the facts in the light most favorable to Plaintiff.

Plaintiff Max serves as an elected committeewoman for Defendant RCLC in Lancaster County, Pennsylvania. (Am. Compl. ¶ 1.) RCLC is a political organization registered under the laws of the Commonwealth of Pennsylvania. (Am. Compl. ¶ 9.) The membership of the RCLC is composed of one commiteeman and one committeewoman for each election district in Lancaster County who are elected by the qualified, registered Republicans from each election district. (Am. Compl. ¶ 9.) The RCLC is governed by the "Rules of the Republican Committee of Lancaster County" currently on file with the Lancaster County Board of Elections (hereinafter "Rules"). (Am. Compl. ¶ 10.) Defendant Dumeyer is the current chairman of the RCLC. (Am. Compl. ¶ 14.) As chairman, according to the rules, Dumeyer is the chief executive officer of the RCLC and its designated spokesman at all levels of Party affairs. (Am. Compl. ¶ 16.) Defendant Heath is an employee and executive director of the RCLC. (Am. Compl. ¶ 19.) Defendant LCRH is a nonprofit corporation controlled by the RCLC. (Am. Compl. ¶ 21.)

Defendant RCLC endorsed a slate of judicial candidates for the party's nomination for six open

seats on the Lancaster County Court of Common Pleas in the May 15, 2007, primary election. (Am. Compl. ¶¶ 41-43.) Two of those endorsed candidates were Howard F. Knisely and Jeffery D. Wright. (Am. Compl. ¶ 44.) Plaintiff opposed Knisely and Wright and, in their place, supported other unendorsed Republican judicial candidates. (Am. Compl. ¶¶ 45-47.) During the primary election campaign, Plaintiff approached a voter who had a "Jeffery Wright" campaign sign in her yard and encouraged her to switch her support to another Republican judicial candidate such as Lancaster County First Assistant District Attorney Heidi Eakin. (Am. Compl. ¶ 48.)

On May 14, 2007, the evening before the primary election, Plaintiff received a telephone call from Defendant Heath. (Am. Compl. ¶ 49.) Heath told Plaintiff he had heard reports of persons telling Wright supporters negative information about Wright's history. (Am. Compl. ¶ 49.) Heath told Plaintiff that he did not know the names of the persons telling negative information about Wright but that he had gotten a license plate number and was having it traced. (Am. Compl. ¶ 50.) Plaintiff told Heath that she had stopped by a home and spoken to a voter about Wright. (Am. Compl. ¶ 52.) Heath and Plaintiff discussed Plaintiff's opposition to Wright, and Heath accused her of telling lies about Wright. (Am. Compl. ¶¶ 50-53.) Heath told Plaintiff that, because of her actions, Defendants would convene a meeting after the election "at which Plaintiff . . . understood that she would likely be asked to resign her elected position as a Republican committeewoman." (Am. Compl. ¶ 54.)

Plaintiff believes Defendants instructed poll workers to observe and report back to Defendants

about her primary election day speech and campaign activities, and certain poll workers did so. (Am. Compl. ¶¶ 56-57.)

On the primary election day, Plaintiff handed out "slate cards" to voters at her voting district's polling station. (Am. Compl. ¶ 58.) These slate cards encouraged voters not to support Knisely or Wright and instead encouraged them to vote for Eakin. (Am. Compl. ¶ 58.) The slate cards were printed at Plaintiff's expense and did not contain the RCLC's name or logo. (Am. Compl. ¶¶ 58-59.)

As a result of her May 14, 2007, conversation with Heath, Plaintiff felt compelled to restrict her speech and campaign efforts in opposition to Wright and Knisely to a small number of voters whom she personally knew rather than to all voters voting at her polling place. (Am. Compl. ¶ 60.) She also feared that further open opposition to Wright and Knisely and support of her candidate would result in additional adverse consequences to her personal reputation and position as committeewoman. (Am. Compl. ¶ 61.)

Plaintiff believes that Defendants held a meeting in late May 2007 during which they determined that she had not done any act that would permit them to forcibly remove her from her committeewoman position. (Am. Compl. ¶ 62.) She believes they intentionally decided to continue to attempt to exclude her unwanted political speech by sending her a letter, dated June 18, 2007. (Am. Compl. ¶¶ 63-64.) The body of the letter, which is printed on RCLC letterhead and signed by Defendant Dumeyer, states the following, in its entirety:

I wanted to send this letter as a follow-up to our meeting on Thursday, May 31, 2007, and thank-you for agreeing to meet with Michael Hench and me. It's never easy to sit and review one's actions, but it is intended to spare embarrassment for you and for the Party in the General Election.

It is inappropriate for a committee member, for instance, to disparage an endorsed candidate, especially to voters who have chosen to support the endorsed ticket. Obviously, promoting the positive qualities of an unendorsed candidate whom one supports may not be inappropriate, as long as it does not accompany negative comments about any endorsed candidate.

It is equally inappropriate for a committee member to use one's status as a committee member outside one's own voting district to disparage endorsed candidates. That can only confuse voters who expect a united message.

As for a separate slate card to distribute at the polls, it simply confuses voters. A separate slate card contradicts the Party's decisions on endorsements, casts doubt about one's role as a "team player," and suggests that personal agendas trump the collective decision made by two-thirds of one's fellow committee members in convention. In these cases, if you have serious reservations about the choice of candidates endorsed by the Party, you should resign from the Committee. This frees one to support wholeheartedly their chosen candidate(s) and to speak against the endorsed candidate(s).

> Similarly, the Party's rules do NOT permit a committee member to advocate a nominee in the General Election who is not both a registered Republican and a nominee of our Party. . . . Thus, if you wish specifically to support Ms. Eakin's election to the County bench, the proper course of action is to resign your position from the Committee. If you feel you simply cannot support the entire Republican ticket, then absenting yourself from the polls could be sufficient, provided there is no other "open and active support" of candidates other than our GOP slate of candidates.
>
> You have some thinking and decision-making to do. I would very much like to have you behind our slate of candidates in the fall, but if your conscience or personal convictions prevent you from doing so, I have laid out two alternative courses of action for your consideration.
>
> Please let me know shortly what action your prayerful consideration leads you to take. Again, my thanks for sitting down to discuss this and my best wishes for a satisfactory decision.

(Defs.' Mem. in Supp. of Mot. to Dismiss Pl.'s Am. Compl. ("Defs.' Mem."), Ex. A, Letter from Dumeyer to Max, June 18, 2007 ("Letter") (emphasis in original).)

As a result of the Defendants' Letter, Plaintiff did not campaign for or against certain Republican judicial candidates in the 2007 general election, although she would have done so if not for the letter. (Am. Compl. ¶¶ 68-69.) Also as a result of the letter, Plaintiff did

not send an election newsletter to voters in her precinct as she had customarily done for previous general elections. (Am. Compl. ¶ 70.)

Plaintiff brought suit against Defendants pursuant to 42 U.S.C. § 1983. (Am. Compl. ¶ 1.) Her Amended Complaint contains five counts. Count I claims that Heath's statement before the primary election that he would use the investigatory police powers of the Commonwealth of Pennsylvania by having a license plate traced placed an impermissible chill on Plaintiff's speech in violation of her First and Fourteenth Amendment rights. (Am. Compl. ¶¶ 87-90.) Count II claims that Heath's statement before the primary election that Plaintiff's opposition to endorsed candidates would result in her removal as a committeewoman placed an impermissible chill on Plaintiff's speech in violation of her First and Fourteenth Amendment rights. (Am. Compl. ¶¶ 92-95.) Count III claims that the circumstances alleged in Counts I and II, combined, placed an impermissible chill on Plaintiff's speech in violation of her First and Fourteenth Amendment rights. (Am. Compl. ¶¶ 97-105.) Count IV claims that Defendants' Letter informing Plaintiff that it is inappropriate for a committee member to disparage an endorsed candidate or campaign for unendorsed candidates placed a content-based regulation on Plaintiff's speech in violation of her First and Fourteenth Amendment rights. (Am. Compl. ¶¶ 102-109.) Count V claims that Defendants' Letter instructing Plaintiff to either endorse Defendants' candidates, resign her committee position, or absent herself from the polls on primary election day placed an impermissible chill on Plaintiff's speech in violation of her First and Fourteenth Amendment rights. (Am. Compl. ¶¶ 111-120.)

For the reasons stated below, Defendants' Motion is granted.

## Standard of Review

In deciding a motion to dismiss pursuant to Rule 12(b)(6), courts must "'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n. 7 (3d Cir. 2002)) (stating that this statement of the Rule 12(b)(6) standard remains acceptable following the U.S. Supreme Court's decision in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007); see id. at 231 (stating that Twombly does not undermine the principle that the court must accept all of plaintiff's allegations as true and draw all reasonable inferences therefrom). To withstand a motion to dismiss under Rule 12(b)(6), "'[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 234 (quoting Twombly, 127 S. Ct. at 1965). Thus, "'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." Id. (quoting Twombly, 127 S. Ct. at 1965); see Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 321 (3d Cir. 2008) (following Phillips). This standard "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Phillips, 515 F.3d at 234 (quoting Twombly, 127 S. Ct. at 1965) (quotations omitted).

"It is well-settled that in deciding a motion to dismiss, courts generally may consider only the allegations contained in the complaint, exhibits attached thereto, and matters of public record." Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 190 (3d Cir. 1999) (citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)). However, the Third Circuit has determined that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document. Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied." Pension Ben. Guar. Corp. v. White Consol. Inds., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) (internal citations omitted). See also Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002) ("Documents that the defendant attaches to the motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the claim; as such, they may be considered by the court." (quoting 62 Fed. Proc., L. Ed. § 62:508)). "[C]onsidering such a document is not unfair to a plaintiff because, by relying on the document, the plaintiff is on notice that the document will be considered." Lum v. Bank of America, 361 F.3d 217, 222 (3d Cir. 2004).

In ruling on Defendants' motion, this court will consider the June 18, 2007, Letter from Dumeyer to Plaintiff, which Defendants attached to their Motion to Dismiss. (See Letter.) Plaintiff references and quotes from this document in her Amended Complaint. (Am. Compl. ¶ 64.§) Plaintiff does not dispute the authenticity of the Letter that is attached as an exhibit

to Defendants' motion. Thus, the Letter is properly considered as if it were attached to the Complaint.

**Discussion**

Section 1983 provides remedies for deprivations of rights established by the Constitution. Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006). "To state a § 1983 claim, a plaintiff must demonstrate the defendant, acting under color of state law, deprived [the plaintiff] of a right secured by the Constitution or the laws of the United States." Id. (citing American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999)). "The first step in evaluating a section 1983 claim is to 'identify the exact contours of the underlying right said to have been violated' and to determine 'whether the plaintiff has alleged a deprivation of a constitutional right at all. Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 841 n. 5 (1998)). If the claim involves alleged deprivation of a constitutional right, the court must determine whether the action was taken under color of law. This is a threshold matter. Versarge v. Twp. of Clinton, N.J., 984 F. 2d 1359, 1363 (3rd Cir. 1993). "Although a private person may cause a deprivation of [a constitutional] right, he may be subjected to liability under § 1983 only when he does so under color of law." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978).

In the Commonwealth of Pennsylvania, each county may have a county committee for each political party in that county. 25 P.S. § 2837.

> The county committee of each party may make such rules for the government of the party in

> the county, not inconsistent with law or with the State rules of the party, as it may deem expedient, and may also revoke, alter or renew in any manner not inconsistent with law or with such State rules, any present or future county rules of such party.

Id. The Lancaster County Board of Elections has determined that RCLC is a political party, and the RCLC is registered as such with the Commonwealth of Pennsylvania. (Am. Compl. ¶¶ 9, 29.) See also 25 P.S. § 2831. Political parties in the Commonwealth are entitled to nominate candidates at primaries. 25 P.S. § 2861.[1] They do so by a vote of the party electors. 25 P.S. § 2831. "No person who is not registered and enrolled as a member of a political party shall be entitled to vote at any primary of such party or to be elected or serve as a party officer, or a member or officer of any party committee." 25 P.S. § 2832.

Plaintiff alleges that the RCLC, a political party, is a state actor in a primary election and, thus, Defendants' actions toward Plaintiff before the 2007 primary election were state actions. (Am. Compl. ¶ 3.)

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[1] According to Pennsylvania statute,

> Each county board shall determine which organizations are political parties within the county, within the meaning of section 801(b), and not later than the thirteenth Tuesday preceding each primary shall transmit to the Secretary of the Commonwealth a list of said political parties which shall be entitled to nominate candidates at primaries in said county.

25 P.S. § 2861(b)

Alternatively, Plaintiff alleges that Defendants acted under color of state law because of their involvement in determining who shall appear on the general election ballot as mandated by the Commonwealth of Pennsylvania. (Am. Compl. ¶ 12.)

In most circumstances, private political parties are simply private organizations who themselves enjoy constitutional rights. Eu v. San Francisco County Democratic Cent. Committee, 489 U.S. 214, 224 (1989) ("It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments."). Those rights include the right to associate and the right to exclude.

> [T]he First Amendment protects the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. That is to say, a corollary of the right to associate is the right not to associate."

California Democratic Party v. Jones, 530 U.S. 567, 574 (2000) (internal quotations and citations omitted). Therefore, "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." New York State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 797 (2008).

Nonetheless, political parties in the Commonwealth of Pennsylvania may engage in state action in some circumstances, thereby subjecting them to claims

under Section 1983. For instance, when a political party, exercising the authority delegated to it by the state, determines that only whites may vote in a primary election, that constitutes state action. See, e.g., Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).

> These rights are circumscribed . . . when the State gives the party a role in the election process – as New York has done . . . by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot. Then, for example, the party's racially discriminatory action may become state action that violates the Fifteenth Amendment.

Lopez Torres, 128 S. Ct. at 797-798 (citing Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107(1981); California Democratic Party v. Jones, 530 U.S. 567 (2000)).

The court finds that Defendants actions toward Plaintiff were not state actions that would subject Defendants to Section 1983 claims. Defendants' actions were internal to the party and are permissible by statute of the Commonwealth of Pennsylvania, 25 P.S. § 2837, and by the First and Fourteenth Amendments of the United States Constitution. Plaintiff is correct that the RCLC has a role as a state actor in primary elections, (Am. Compl. ¶ 3), but that does not make all of RCLC's actions state actions, as Plaintiff contends.

The court also finds that Defendants' actions toward Plaintiff were not taken under color of state

law. There are three tests for state action for Section 1983 purposes: 1) the "public function" test; 2) the "symbiotic relationship" test; and 3) the "close nexus" test. Brown v. Philip Morris Inc., 250 F.3d 789 (3d Cir. 2001). The public function test asks whether the defendant performs a function that is "traditionally the exclusive prerogative of the State." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974)). Defendants were not performing such a function when they stated they would trace a license plate number[2] or when they told her not to oppose the party or to resign.

The symbiotic relationship test asks whether the government has "insinuated itself into a position of interdependence" with the defendant. Brown, 250 F.3d at 803 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). See also Benn v. Universal Health System, Inc., 371 F.3d 165, 173 (3d Cir. 2004) ("A symbiotic relationship demands a close association of mutual benefit between the state and the private entity or person.") (internal quotations and citation omitted). The symbiotic relationship test provides only a narrow basis for finding that private action may be attributed to the state. Crissman v. Dover Downs Entertainment, Inc., 289 F.3d 231, 242 (3d Cir. 2002) (en banc). Here, Plaintiff has not alleged facts that support a symbiotic relationship between the state and Defendants.

The close nexus test requires a plaintiff to show that "there is a sufficiently close nexus between the

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[2] Plaintiff does not allege that Heath threatened to trace a license plate number after having received her license plate number.

State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson, 419 U.S. at 351. "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). Here, again, Plaintiff has not pled circumstances that support a close nexus between the state and Defendants' actions toward Plaintiff. The court finds that Defendants' actions were internal to the political party. Thus, the court finds that Plaintiff has not pled that Defendants acted under color of state law when they reprimanded her for her political speech. Plaintiff's Section 1983 claims are dismissed.

An Order follows.

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION
**No. 07-4488**

**[Dated October 3, 2008]**

| | |
|---|---|
| MILLIE MAX, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| REPUBLICAN COMMITTEE OF LANCASTER COUNTY, et al., | ) |
| | ) |
| Defendants. | ) |

**ORDER**

AND NOW, this 3rd day of October, 2008, it is hereby ORDERED that Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. No. 15) is GRANTED and the above-captioned action is DISMISSED for the reasons stated in the accompanying memorandum.

BY THE COURT:

S/ James T. Giles
J.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**No. 08-4158**

**[Filed December 16, 2009]**

MILLIE MAX,
Appellant

v.

REPUBLICAN COMMITTEE OF LANCASTER COUNTY; DAVID M. DUMEYER, In his Official Capacity as Chairman of the Republican Committee of Lancaster County; ANDREW HEATH; LANCASTER COUNTY REPUBLICAN HEADQUARTERS, a nonprofit corporation

### SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by Appellant Millie Max in the above-entitled case having been submitted to the judges who participated in the decision of this

court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: December 16, 2009
trj/cc: Paul A. Rossi, Esq.
Robert M. Frankhouser, Jr., Esq.
Kevin M. French, Esq.
Mark D. Schwartz, Esq.